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May 18, 1983

BY NOW COURIER SERVICE

RECEIVED
MAY 19 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Honorable Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Calder, et al v. Jones, et al
No. 82-1401

Dear Mr. Stevas,

On Monday, May 16, 1983, this office, which represents Appellees Shirley Jones and Marty Ingels in the above captioned appeal received Appellants' "Suggestion of Mootness As To Appellee Ingels". We were given no advance notice that such a document would be filed. In a subsequent telephone conversation with Mr. Frank Larsen of your office, I was advised that Appellants' Suggestion of Mootness would be discussed at a Clerk's Conference on Thursday, May 19, 1983. This allows Appellees only two days to respond to a filing in this appeal which seeks significant relief from this court, to wit, the vacation of a lower court judgment and an award of costs against one Appellee. Accordingly, Appellees submit that the full 10 day response time under Rule 42.4 should have been allowed.

To apprise the Court of Appellees' position on this matter I am forwarding this letter to your office for consideration at the Thursday conference. The substance of the letter will be later printed and filed with the Court in accordance with the pertinent Court rules and the permission of Mr. Larsen of the Clerk's office pursuant to our conversation on Monday, May 16, 1983.

ARGUMENT

Appellees Shirley Jones and Marty Ingels confirm that Mr. Ingels has alone dismissed his claims in the trial court against all defendants in this action, including Appellants. However, that dismissal has no effect on this appeal and it does not follow that the judgment below of the California Court of Appeal and the California Supreme Court's denial of hearing can or should be vacated or otherwise affected as to Mr. Ingels or that any award of costs be made against him. This is so because the

underlying facts and the substantive issues of this appeal are unaffected by the dismissal.

Appellants concede in their suggestion that the dismissal of Mr. Ingels in no way affects the position of Appellee Jones or the issues of this appeal as framed by Appellants. Any taxable costs under Rule 50 will be incurred by Appellants regardless of the dismissal. In addition, since Appellants have not yet filed their Joint Appendix with the Court, and will not be doing so until June 17, 1983, they have not yet incurred costs. The case of Dyer v. City Council of Benoit, 333 U.S. 825 (1948), cited by Appellants is simply a per curiam decision announcing a costs award after dismissal of an appeal for mootness with no discussion of the relevant facts upon which the award was based.

As to the question of vacating the lower court's judgment, Appellants are wrong in stating that the case has become moot and wrong in stating that the practice of this Court requires the vacation of the judgment. The parties are in this forum on Appellants' instance and there is no contention of mootness as to them, as was so in DeFunis v. Odegaard 416 U.S. 312 (1974) (Appellant's case moot since at time of hearing he was about to complete his legal education) and Garvin v. Cochran 371 U.S. 27 (1962) (Habeas Corpus application rendered moot by death of applicant prisoner).

It is only when an entire case becomes moot that the dismissal of appeal and the vacating of a lower court judgment is appropriate. Crowell v. Mader 444 U.S. 505, 506 (1980). Where the case becomes moot as to only one appellee and others remain, it is not appropriate to dismiss the entire appeal and vacate a lower court judgment respecting other parties. Kremers v. Bartley 431 U.S. 119, 129 (1977).

In this case there is in fact no way to vacate the lower court judgment which would not prejudice the rights of Appellee Jones, since the jurisdictional facts of this dispute involve both Appellants and both Appellees. That judgment should stand in its entirety pending this Court's review regardless of whether or not Mr. Ingels remains a party to this appeal. See, Werner v. Southern California Associated Newspapers, 35 Cal 2d 121 (1950), appeal dismissed, 340 U.S. 910 (1950) (Dismissal of appeal prior to Supreme Court review on merits but after jurisdiction noted had no effect on lower court judgment.)

The appropriate resolution of this matter would be the dismissal of the appeal as to Appellee Ingels leaving the lower court judgment standing as to him, where he remains the prevailing party. Since that decision will stand, the appropriate resolution of the costs issue is that each party should bear their own as to Mr. Ingels' appeal.

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Appellants present neither logic nor authority to justify the vacating of the lower court judgment when the case remains fully viable and justiciable as between the two Appellants and Appellee Jones. Similarly, there is no basis for any costs award. Accordingly, this matter should proceed forthwith on the merits.

Respectfully submitted,

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